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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Amendment of the Commission's Rules) WT Docket No. 95-157
Regarding a Plan for Sharing) RM-8643
the Costs of Microwave Relocation)

To: The Commission

PETITION FOR RECONSIDERATION/CLARIFICATION

Pursuant to Section 1.429 of the Federal Communications Commission's (Commission) Rules, UTC, The Telecommunications Association (UTC), hereby submits *its Petition for Reconsideration/Clarification (Petition)* in response to the Commission's *Second Report and Order (SR&O)*, FCC 97-48, released February 27, 1997, in the above-referenced docket. UTC urges the Commission to reconsider its decision to apply the cost-sharing depreciation formula to incumbent self-relocations. In addition, UTC requests that the FCC clarify that incumbent relocators have the same rights as PCS relocators to reimbursement for costs associated with the relocation of microwave paths since April 5, 1995.

UTC is the national representative on communications matters for the nation's electric, gas, water and steam utilities, and natural gas pipelines. Approximately 1,400 such entities are members of UTC, ranging in size from large combination electric-gas-water utilities which serve millions of customers, to smaller, rural electric cooperatives and water districts which serve only

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a few thousand customers each. Serving on UTC's Board of Directors are representatives from its affiliated trade associations, including:

- American Gas Association
- American Public Power Association
- American Water Works Association
- Edison Electric Institute
- Interstate Natural Gas Association of America
- National Rural Electric Cooperative Association

All utilities and pipelines depend upon reliable and secure communications to assist them in carrying out their obligations to provide service to the public, and many operate 2 GHz systems which are subject to relocation by emerging technology licensees. To protect its members' vital interests in these systems, UTC has been an active participant in this proceeding, and in the related proceeding involving the relocation framework, ET Docket No. 92-9. As the association representing one of the largest segments of 2 GHz incumbents, UTC has a vital interest in ensuring that the cost-sharing rules are equitably applied to incumbents.

I. Incumbent Cost-Sharing Rights Should Not Be Subject To Depreciation

In the *SR&O*, the Commission decided to allow incumbents to relocate their own microwave paths and participate in the cost-sharing mechanism previously adopted by the Commission for PCS licensees. UTC applauds this decision and agrees with the Commission that incumbent self-relocation will accelerate the relocation process by promoting system-wide relocations, allow parties to avoid time-consuming negotiations and, in some cases, even reduce the overall cost of clearing the 2 GHz band.¹ UTC urges the Commission to modify the

¹ *SR&O*, para. 25.

application of its cost-sharing rules to incumbents in order to maximize these benefits. In particular, the Commission should reconsider its decision to apply the depreciation formula to incumbent self-relocations.

The Commission's decision to subject incumbent self-relocation expenses to depreciation is without a logical basis. In the *SR&O*, the Commission offered two reasons for this decision: (1) microwave incumbents which self-relocate receive benefits they might not otherwise receive that should be accounted for; and (2) depreciation provides an incentive for microwave incumbents to minimize costs.² Neither of these reasons can survive scrutiny.

The first justification offered by the Commission attempts to take into account the benefits to the incumbent of early relocation from the 2 GHz band. However, the benefits cited by the Commission are not unique to self-relocating incumbents. Incumbents which choose not to self-relocate are still guaranteed to be seamlessly relocated to comparable facilities, and are subject to no less certainty than self-relocating incumbents. The greater benefits of microwave self-relocation accrue to the PCS licensees. Incumbent self-relocation permits PCS licensees to deploy their services more quickly and at lower costs than generally would be possible under a negotiated relocation agreement. Incumbent self-relocation also eliminates the time and administrative difficulties that may be associated with negotiations and eliminates the PCS licensee's burden of securing comparable relocation spectrum for the incumbent.

² *SR&O*, para. 27.

The second justification is equally without merit. As UTC noted in its comments and reply comments on the *Further Notice of Proposed Rulemaking (FNPRM)*,³ there are numerous safeguards in place to ensure that incumbent relocators minimize costs.⁴ Among these are:

- *The inherent risk of self relocation that the reimbursement obligations may never arise.* The Commission's rules require that reimbursement rights will only apply to PCS licensees whose operations would have interfered with the relocated path pursuant to the Proximity Threshold Test.⁵ Therefore, incumbents can never be certain that a subsequent PCS licensee will ever be required to reimburse them for relocation costs. Moreover, the sunset of relocation obligation in 2005⁶ adds an additional layer of uncertainty which further incentivizes incumbents to minimize costs.
- *The Commission's reimbursement cost caps.* Incumbents will be ineligible to receive compensation for amounts exceeding the Commission-specified caps.⁷
- *The Commission's cost support documentation and third-party appraisal requirements.* The Commission's rules require that incumbent relocators file documentation of their reimbursable costs with the clearinghouse. Additionally, incumbent relocators must also obtain an appraisal of relocation costs by an independent third party.⁸ These rules ensure that only reasonable costs will be reimbursed.
- *The close scrutiny of expenditures by utilities and pipelines.* As heavily regulated entities, utility and pipeline expenditures are generally closely scrutinized by state regulators. This scrutiny ensures that no ratepayer money is spent on unnecessary projects, such as "goldplated" relocation systems.

Incumbent self-relocators should be treated similarly to PCS licensees which seek reimbursement for relocation costs associated with microwave paths that are outside of their operating areas or frequencies. Under the rules adopted in the *First Report and Order (FR&O)*, these PCS licensees are entitled to full reimbursement up to the reimbursement caps and are not

³ 11 FCC Rcd 8825.

⁴ UTC Comments, pp. 7-8; UTC Reply Comments, p 7.

⁵ 47 CFR §24.247.

⁶ 47 CFR §24.253.

⁷ 47 CFR §24.243(b).

⁸ 47 CFR §24.247.

subject to the depreciation formula.⁹ By their very nature, microwave relocators are in same position as these PCS licensees – they are relocating paths that are outside their PCS operating territories and PCS frequencies because their microwave licenses do not permit them to offer PCS. Additionally, as with PCS licensees which relocate paths outside their licensed territories or frequencies, incumbents are offered no competitive advantages vis-à-vis other PCS licensees by their decisions to self-relocate. In fact, any benefits they do receive are limited to the relocation to comparable facilities outside of the 2 GHz band. On the other hand, subsequent PCS licensees, which would have been required to negotiate relocation terms, clearly and directly benefit from these self-relocations.

As UTC has consistently maintained in this proceeding, incumbent relocators should be treated the same – no better and no worse – as PCS relocators.

II. If The Depreciation Formula Is Applied To Incumbent Relocators, The FCC Should Clarify The Formula's Application To Incumbents

In the event that the FCC determines to apply the depreciation formula to microwave incumbents who avail themselves of the opportunity to self-relocate microwave links, the FCC should clarify, at a minimum, the application of this formula to incumbents. As adopted by the Commission in the *First Report and Order (FR&O)*, the formula for determining the depreciation of cost-sharing obligations is as follows:

$$\text{Amount of reimbursement} = C_N \times \frac{[120 - T_m]^{1/2}}{120}$$

⁹ *FR&O*, para. 74, Appendix A, paras. 16-17.

Under this formula, C equals the actual relocation costs, N equals the number of PCS licensees that would have interfered with the link; and T_m equals the number of months that have elapsed between the time that relocation rights were established and the month that the clearinghouse notifies a later-entrant of its reimbursement obligation.¹⁰

In the *SR&O*, the FCC provides some additional guidance on applying this formula to incumbent relocators, noting, for instance, that C includes a voluntary relocating incumbent's third-party appraisal of relocation costs. However, the Commission does not provide guidance with regard to the application of the "N" factor. While the only reasonable interpretation of this formula can be that the incumbent relocator is not considered a PCS licensee and thus not considered in the depreciation formula, the Commission should clarify this point to avoid any potential uncertainty.

Without clarification, UTC fears that some PCS licensees will try to avoid paying their fair share of the relocation costs by seeking to have this formula applied such that $N = 1$ when the incumbent accomplishes the relocation, and $N = 2$ when the first PCS licensee is determined to have interfered with the relocated link.¹¹ Such an interpretation is ludicrous. By depriving the incumbent relocator of a portion of its relocation reimbursement simply for participating in the Commission's cost-sharing plan, the goals of the plan would be frustrated. Incumbents would

¹⁰ 47 CFR §24.243(b).

¹¹ Unfortunately, UTC has been made aware by its members of the aggressive negotiation tactics undertaken by some PCS licensees which have attempted to "bend" the Commission's rules beyond reasonable interpretations. While UTC continues to believe that the relocation framework provides a workable solution for relocating microwave incumbents from the 2 GHz band, UTC recommends that the Commission closely monitor the negotiation tactics of PCS licensees and take appropriate action when PCS licensees intentionally mischaracterize or misstate the Commission's rules to gain negotiating advantages.

not self-relocate, but would simply wait to be approached by PCS licensees. PCS licensees would, in turn, lose the benefits associated with incumbent self-relocation (expedited PCS deployment, the elimination of negotiation expenses, etc.).

The depreciation formula is intended to determine the correct allocation of relocation expenses among PCS licensees. Therefore, the FCC should clarify that when the first PCS licensee is determined to have interfered with the link pursuant to the proximity threshold test, $N = 1$.

III. Incumbents Should Be Eligible For Cost-Sharing Expenses Incurred Since April 5, 1995

Another issue that must be clarified by the Commission involves the application of the cost-sharing rules to microwave self-relocations occurring prior to the effective date of the *SR&O*. The Commission's rules permit PCS relocators to submit receipts or other documentation to the clearinghouse for relocation expenses incurred since April 5, 1995 – the date that the voluntary relocation period began for the first PCS licensees.¹² However, it is unclear whether incumbent relocators have this same right. UTC urges the Commission to clarify that incumbent relocators are eligible for reimbursement for reasonable relocation costs incurred since April 5, 1995.

There is no valid reason for treating incumbents more harshly than PCS relocators. As UTC noted above, the Commission's rules already provide safeguards against unreasonable reimbursement requests. All participants in the cost-sharing mechanism, including incumbents, are subject to these same rules which minimize reimbursable relocation costs. For instance,

¹² 47 CFR §24.245(b).

incumbents are required to submit cost data and are subject to restrictions on the types and amounts of reimbursable costs. These rules would apply equally to relocations occurring retroactively or prospectively to the Commission's decision to permit incumbent participation in the cost-sharing program. Incumbents are even subject to an additional level of scrutiny that ensures that only reasonable relocation costs are reimbursed. The Commission's rules require incumbents to submit third-party appraisals of relocation expenses to the clearinghouse along with the cost data. This same requirement could apply retroactively by requiring incumbents which seek reimbursement for paths relocated within the past two years to provide a third-party appraisal. This appraisal could be one that was prepared prior to the relocation by the incumbent, or an appraisal of the documented hard costs incurred and replacement equipment actually installed.

There is no need for additional restrictions that would serve only to allow PCS licensees to avoid paying an equitable portion of the relocation expenses. One of the basic principles of the cost-sharing rules is that PCS licensees should be required to pay relocation obligations when they benefit from the spectrum clearing benefits of another party.¹³ There can be no doubt that later-entrant PCS licensees which would have interfered with the incumbent path benefit from incumbent self-relocation, regardless of whether this relocation occurs on April 5, 1995, or April 17, 1997. Equity requires that the microwave incumbents be eligible for cost reimbursement on the same terms and conditions as PCS licensees.

¹³ *FR&O*, para. 71

Alternatively, if the Commission chooses not to treat incumbent relocators equally to PCS relocators, it should at a minimum permit incumbents to be reimbursed for self-relocated paths which were moved contemporaneously with PCS-relocated paths as part of a system-wide replacement. As UTC has noted previously in this docket, utility and pipeline microwave systems offer critical communications that can not be disrupted by piecemeal equipment replacement. In order to fulfill their public service duties and provide the safe, reliable and efficient service that they are required to offer, many utilities and pipelines self-relocated links when they were unable to negotiate an entire system changeout from a PCS licensee. Incumbents should not be penalized for ensuring the reliability of their vital communications systems. Instead, incumbents should be eligible to receive compensation for microwave paths relocated contemporaneously with PCS-relocated paths.


Conclusion

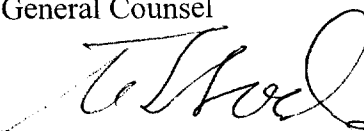
UTC urges the Commission to reconsider its decision to apply the cost-sharing depreciation formula to incumbent self-relocations. Incumbents should be treated the same as PCS licensees which relocate microwave links outside their PCS operating territories or frequencies. UTC also requests that the FCC clarify that incumbent relocators have the same rights as PCS relocators to reimbursement for reasonable costs associated with the relocation of microwave paths since April 5, 1995.

WHEREFORE, THE PREMISES CONSIDERED, UTC requests the Federal Communications Commission to take action in accordance with the views expressed in these comments.

Respectfully submitted,

UTC

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Dated: April 17, 1997